

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Richard Lowery, on behalf of himself
and others similarly situated,

Plaintiff,

v.

Texas A&M University System, et al.,

Defendants.

CIVIL ACTION NO.
4:22-cv-3091

JUDGE CHARLES ESKRIDGE

**PLAINTIFF RICHARD LOWERY’S OPPOSED MOTION
FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Plaintiff Richard Lowery respectfully asks for leave to file a second amended complaint. Mr. Lowery wishes to add factual allegations showing that an Article III case or controversy continues to exist despite the enactment of Senate Bill 17 and the Supreme Court’s recently announced ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199. Neither of these events had occurred when Mr. Lowery filed his first amended complaint on December 23, 2022. Yet the defendants are seeking to dismiss Mr. Lowery’s complaint on mootness grounds in response to SB 17,¹ even though Mr. Lowery did not have an opportunity to allege facts relevant to the effects of SB 17 and *Students for Fair Admissions* when he filed his first amended complaint last December.

Mr. Lowery is not amending anything else in his complaint, and nothing in the second amended complaint will undercut the defendants’ pending motion to dismiss

1. See Docket Entries 28 and 33.

for lack of Article III standing, sovereign immunity, and failure to state a claim,² as each of the defendant's arguments on these issues is equally applicable to the second amended complaint that Mr. Lowery is seeking leave to file. If the Court grants the motion for leave to amend, then we would respectfully ask the Court to construe the pending motion to dismiss the first amended complaint (ECF No. 22) as a motion to dismiss the second amended complaint, and to construe the response and reply briefs (ECF Nos. 25 and 26) as responses and replies to that newly construed filing. This would avoid a need for the parties to re-submit anything on these fully briefed issues.

Leave to amend should be “freely give[n] . . . when justice so requires.” Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (“[U]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial.”). Leave to amend is consistent with justice because: (1) Mr. Lowery had no opportunity to allege facts regarding the effects of SB 17 or *Students for Fair Admissions* on the justiciability of his claims in his first amended complaint, which was filed in December of 2022; (2) The proposed amendments will not undercut or require re-submission of the defendants’ pending motion to dismiss (ECF No. 22), as Mr. Lowery is not amending any of his allegations related to Article III standing, sovereign immunity, or his supposed failure to state a claim on which relief may be granted; and (3) The defendants will not be prejudiced by the amendments because the new allegations concern only whether the case has become moot in the wake of SB 17 and *Students for Fair Admissions*.

2. *See* Docket Entries 22 and 26.

We have attached a redlined version and a clean version of the proposed second amended complaint as exhibits to this filing. Counsel for the defendants are opposed to this motion.

CONCLUSION

The motion for leave to file a second amended complaint should be granted.

Respectfully submitted.

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Dated: July 12, 2023

*Counsel for Plaintiff and
the Proposed Class*

CERTIFICATE OF WORD COUNT

I certify that this motion contains 526 words.

/s/ Jonathan F. Mitchell

JONATHAN F. MITCHELL

Counsel for Plaintiff and the Proposed Class

CERTIFICATE OF CONFERENCE

I have conferred with Layne E. Kruse, counsel for the defendants, and he informed me that his clients are opposed to this motion.

/s/ Jonathan F. Mitchell

JONATHAN F. MITCHELL

Counsel for Plaintiff and the Proposed Class

CERTIFICATE OF SERVICE

I certify that on July 12, 2023, I served this document through CM/ECF upon:

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